Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARTIN DAYTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did this Court's holding in *Carlisle v. U.S.*, 517 U.S. 416, 429, 116 S. Ct. 1460, 1468 (1996), completely terminate the availability of the writ of coram nobis as a remedy for constitutional violations at a federal criminal trial, when this Court held in *Carlisle* that "it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate"?

2. Is the writ of coram nobis available to remedy the denial of the effective assistance of counsel which deprives the accused of his Sixth Amendment right to counsel at a federal criminal trial?

PARTIES TO THE PROCEEDING

In the present coram nobis proceeding, the present caption lists all the parties before the District Court and Court of Appeals.

In the underlying criminal trial which preceded the coram nobis proceeding, there were two additional parties: Elias Sayegh and Susan Sayegh who were co-defendants. The Sayeghs are not parties to the coram nobis proceeding.

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The order and judgment of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal judgment of the District Court is attached as Appendix A. It is not reported. The opinion of the District Court dismissing the petition for a writ of coram nobis without a hearing is attached as Appendix B. It is not reported.

BASIS FOR JURISDICTION

The order and judgment of the Eleventh Circuit sought to be reviewed was entered Oct. 30, 1998 (App. A). No petition for rehearing was filed in the Eleventh Circuit because petitioner was not informed of the Eleventh Circuit's judgment until more than two months after its entry (due to apparent error of a deputy clerk in that Court) when petitioner received notice of an award of costs on the appeal. By then it was too late to seek rehearing in the Eleventh Circuit but still in time to seek certiorari in this Court. Sup. Ct. R. 13(1).

This Court has jurisdiction over this petition by reason of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Title 28 United States Code, section 1651(a), the All Writs Act, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. Introduction and Overview

This case involves the fundamental writ of coram nobis which this Court has not addressed in any meaningful form for 45 years since *U.S. v. Morgan*, 346 U.S. 502, 74 S. Ct. 247 (1954). Coram nobis is a fundamental post-trial remedy for constitutional violations at a federal criminal trial under 28 U.S.C. § 1651. *U.S. v. Morgan*, *supra* (coram nobis to redress the denial of counsel at federal criminal trial). It is typically used where the writ of habeas corpus is not available under 28 U.S.C. § 2255.

The coram nobis remedy is essential. For many defendants including present petitioner, it is the *only* post-trial remedy for serious constitutional violations which cannot be raised at trial, including the ineffective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) (ineffective assistance of counsel violates Sixth Amendment). Habeas corpus is often not available because, as here, a convicted defendant may not be incarcerated and thus does not satisfy the "in custody" requirement for habeas relief. Without coram nobis, many defendants would have no remedy whatsoever.

Unfortunately, this Court caused confusion 3 years ago when it suggested that coram nobis may no longer be available in federal criminal practice. *Carlisle v. U.S.*, *supra*, 517 U.S.

at 429, 116 S. Ct. at 1468 (1996) ("it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate"). This Court's unfortunate suggestion has the potential to mislead the federal bar and Bench, including the Eleventh Circuit below, to deny coram nobis relief where it is essential to the protection of constitutional rights at trial.

That is the situation here. Petitioner was denied his Sixth Amendment right to counsel because his trial counsel was incompetent in the extreme. Trial counsel defaulted in calling critical defense witnesses and defaulted in objecting to governmental misuse of critical evidence at trial.

Petitioner sought coram nobis relief, his only remedy for the ineffective assistance of counsel. But under the influence of this Court's recent decision in *Carlisle*, the Court of Appeals summarily affirmed the District Court's dismissal, and left petitioner without a remedy. This Court's grant of certiorari can reaffirm the availability of coram nobis relief against the contrary and confusing suggestion in this Court's 1996 opinion in *Carlisle v. U.S.*, and can provide the first comprehensive guidance for this fundamental writ in 45 years.

B. Background of the Underlying Criminal Charges

Petitioner Dr. Martin Dayton is a physician practicing medicine in Florida. He has a clean criminal record except for the single conviction at issue.

On a Sunday in March 1982, when his office was closed, Dr. Dayton received an emergency telephone call on his answering service requesting emergency treatment for a young girl who had been scalded with hot coffee on her face and torso. Dr. Dayton rushed to his office and opened it, without staff on

a Sunday, to treat the unfortunate young girl. Without staff (Sunday), Dr. Dayton did not open a formal chart, as this function is performed by his staff. Dr. Dayton preliminarily treated the young girl on the Sunday and instructed her parents to return with her the next day for further treatment. They did not.

Instead, they procured further treatment elsewhere and returned to Dr. Dayton 2 years later in 1984. By that time, the burn had healed, and the girl's parents requested that Dr. Dayton prepare a report, reconstructing the initial 1982 visit of 2 years earlier. Dr. Dayton complied and prepared the 1984 report reconstructing the 1982 visit of 2 years earlier.

Unbeknownst to Dr. Dayton, the parents were professional scam artists, previously had been convicted of insurance fraud (phony auto accidents), and now were perpetrating yet another fraud. Their daughter in fact had *not* been scalded with coffee in 1982 (as they claimed in their visit to Dr. Dayton) but instead had been scalded with coffee 4 years earlier in 1978 and then was sun-burned in 1982 — 4 years later. The 1982 sunburn caused blistering and oozing on top of the 1978 coffee scald and made the 4-year-old 1978 coffee scald appear to be fresh. The parents used the fresh 1982 sunburn to claim (fraudulently) that their daughter was scalded in 1982 to file a fraudulent insurance claim under a neighbor's home insurance policy. The parents used Dr. Dayton's report to support their fraudulent insurance claim.

Dr. Dayton was unaware of the fraud, and prepared his report in reliance upon the parents's representation that the 1982 burn was in fact a fresh coffee scald. Dr. Dayton was unaware of the earlier 1978 coffee scald and unaware of the 1982 sunburn which made the 4-year-old 1978 coffee scald appear to be fresh.

The insurance company settled and paid $155,000 to the parents. None of this money went to Dr. Dayton, and the government does not claim that Dr. Dayton ever received a penny from it.

In a 9-count indictment, the government charged the parents with conspiracy and numerous frauds including mail fraud and wire fraud. The government also charged Dr. Dayton with mail fraud and conspiracy — because of his report issued in reliance on the parents's description of their daughter's burn. The parents and Dr. Dayton were charged and tried together.

The parents were convicted on all counts. Dr. Dayton was convicted on one count of mail fraud and one count of conspiracy. Dr. Dayton was sentenced to pay $6,000 fine and $56,000 to the insurance company. Dr. Dayton was not sentenced to imprisonment, but his conviction disqualifies him from participating in Medicaid and many HMO/insurance programs.

C. The incompetence of petitioner's counsel at trial

At trial, Dr. Dayton's counsel was supremely incompetent. He sat like a bump-on-a-log at numerous critical junctures, failing to call critical witnesses to confirm Dr. Dayton's innocence (lack of knowledge of the parents's fraud) and failing to challenge or explain the government's seriously misleading use of evidence before the jury.

Failure to seek critical defense witnesses: The best witnesses to Dr. Dayton's innocence were the parents themselves. They knew Dr. Dayton was unaware of their fraud and thus was innocent of the charges against him. However, at a joint trial, they could not be compelled to testify for Dr. Dayton because of the Fifth Amendment. There is a remedy,

but Dr. Dayton's counsel defaulted in seeking it. There is a Due Process right to severance, recognized by this Court, to obtain the exculpatory testimony of co-defendants who cannot be compelled to testify in a joint trial. *Zafiro v. U.S.*, 506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993), *expressly approving Tifford v. Wainright*, 588 F.2d 954, 956-57 (5th Cir. 1979) (severance to gain exculpatory co-defendant testimony). Dr. Dayton's counsel ignored this established Due Process right, and defaulted in seeking severance to gain this essential exculpatory co-defendant testimony.[1]

The prejudice to Dr. Dayton was severe. Co-defendant Elias Sayegh (young girl's father) was willing to exonerate Dr. Dayton at trial but for the risk of incriminating himself. At a joint trial, co-defendant Sayegh refused to testify but at a separate trial would have done so. Several years later, at a post-trial hearing, when co-defendant Sayegh's trial was already over, he testified at length to Dr. Dayton's innocence and to his own guilt. He testified that he himself perpetrated the scam against the insurance company, that he used his daughter's 1982 sunburn with its blistering and oozing (on top of the 1978 coffee scald) to appear as a fresh coffee scald for the 1982 visit to Dr. Dayton's office, and that Dr. Dayton was ignorant of this. At the post-trial hearing he testified:

---

1. At the time of Dr. Dayton's trial, the binding Circuit precedent compelled severance to gain co-defendant testimony. *Tifford v. Wainright*, *supra*; *Byrd v. Wainright*, 428 F.2d 1017 (5th Cir. 1970). This Fifth Circuit precedent is binding in the Eleventh Circuit which was formed from the Fifth Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Yet Dr. Dayton's counsel totally ignored it. This Court expressly affirmed the viability of this Circuit precedent. *Zafiro v. U.S.*, *supra*.

Q: Describe [your daughter's burn] further.

A: It is a red sunburn, you go to the beach, you get red sunburn. That is how she was burned. . . .

Q: And what was your reason, then, for taking your daughter to see Dr. Dayton in 1982, or having your wife take her, as you testified to?

A: As I said, ma'am, I did it for a scam for the insurance company. . . .

Q: Did you ever discuss with Dr. Dayton that you wanted to file a false claim with the insurance company?

A: No.

Q: Did Dr. Dayton ever tell you that he was aware that you were filing a false claim?

A: No. . . .

Q: . . . Did you ever tell your wife in so many words, or whatever words there would have been, that you wanted her to tell Dr. Dayton to help with this fraud?

A: No.

Q: And you never had any discussion with Dr. Dayton about it, did you?

A: No.

Q: *To your knowledge, Dr. Dayton didn't know what you were doing with the insurance company, did he*?

A: *He [Dr. Dayton] didn't know nothing....*

Q: But it is still your testimony that *Dr. Dayton did not know from you, he certainly did not know that this was an insurance claim, that this was a fraudulent situation. He did not know that*?

A: *No.*

(11th Cir. exh. vol. 2, doc. 157 at pp. 9-10, 21-22 (emp. added) (tr. of post-trial hearing on motion for new trial).

This is precisely the exculpatory testimony which Dr. Dayton had implored his trial counsel to obtain. Trial counsel defaulted, despite an established Due Process remedy to get it. Its impact on a jury likely would have been compelling — the mastermind of the scam admitting his own guilt while exonerating Dr. Dayton who was ignorant of it — who "didn't know nothing". Trial counsel did nothing to obtain it for trial.

Failure to object to serious misuse of 2-year-old photographs: At trial, defense counsel also defaulted in response to the government's serious misuse of photographs of the burn to mislead the jury. The critical issue was Dr. Dayton's scienter, i.e., whether he was aware of the parents's fraud. To show scienter, the government used 2-year-old photographs of the burn, taken in 1984 (2 years after the 1982 visit to Dr. Dayton's office), to show that Dr. Dayton supposedly was lying. Dr. Dayton's report recited a *fresh* burn during the 1982 office visit. The government used photographs of a *healed* burn, to show the jury otherwise. But the photographs were taken 2 years

later (1984). The government never mentioned this 2-year lag to the jury and concealed the fact that the 2-year-old photographs (healed burn) could not possibly show what Dr. Dayton saw 2 years earlier (fresh burn) during the 1982 office visit. This seriously misled the jury to believe that Dr. Dayton was lying when he reported seeing a fresh burn during the 1982 office visit.

In response, Dr. Dayton's counsel did nothing whatsoever — no objection, no cross-examination, no argument, — to alert the jury to the fact that the photographs were taken 2 years after the office visit and thus could not possibly show what Dr. Dayton saw 2 years earlier.

The record clearly shows the government's misuse of the 2-year-old photographs in both expert testimony and summation:

> Q [to expert witness]: A [healed] scar such as this [1984 photograph]?
>
> A: There's no weaving. There's no blistering. There's no red surface. And the redness has subsided. *This is a matured burn* [1984 photograph].
>
> Q: What about somebody [like Dr. Dayton] that isn't specialized in, but one that runs a family practice, in your opinion could someone like that be able to *distinguish a burn over a period of time from one that is fresh*?
>
> A: I would hope any physician could.

(11th Cir. exh. vol. 6 at 224-25 (trial tr.) (emp. added). The government continued its misuse of the photographs in summation:

> [PROSECUTION'S SUMMATION, CONT'G]: Now, one of the Government's last witnesses, ladies and gentlemen, an extremely important one is Dr. Mullin. . . .
>
> How did he fit into this case? Well he examined [the daughter] on May 14th, 1984. He had a chance to see her. He took notes. He came here with a chart. *He had photographs. He said it was a mature burn.*"

(11th Cir. exh. vol. 8 at 24 (trial tr.) (emp. added).

The prosecution emphasized the photographs to the jury, but never mentioned that the photographs were taken 2 years later — 2 years after the visit to Dr. Dayton's office — and thus could not possibly rebut what Dr. Dayton saw (fresh burn) during the office visit.

Dr. Dayton's trial counsel did *nothing* in response. He left the jury with the serious (and unrebutted) misimpression, based on the government's misuse of the photographs, that Dr. Dayton supposedly lied when he reported a fresh burn during the office visit.

The jury convicted Dr. Dayton of mail fraud and conspiracy. Dr. Dayton's trial counsel had defaulted in seeking the exculpatory testimony of the parents and had defaulted in rebutting the government's serious misuse of the 2-year-old photographs. These defaults seriously prejudiced Dr. Dayton before the jury.

D. Procedural history after trial

Dr. Dayton timely appealed his conviction. The Eleventh Circuit affirmed without opinion. *U.S. v. Dayton*, 869 F.2d 1500 (11th Cir. 1989). This Court denied certiorari. *Dayton v. U.S.*, 490 U.S. 1082, 109 S. Ct. 2104 (1989).

In 1991 Dr. Dayton's post-trial counsel filed a motion under Fed. R. Crim. P. 33 for a new trial based on the now-available testimony of the girl's father who would exonerate Dr. Dayton. The District Court initially denied the motion as untimely. On appeal, the Eleventh Circuit reversed, holding the motion timely. *U.S. v. Dayton*, 981 F.2d 1200 (11th Cir. 1993). On remand, the District Court denied the motion on the merits, after a hearing, holding that the father's testimony of Dr. Dayton's innocence (ignorance of the parents's scam) lacked credibility (App. C) (testimony quoted at pp. 7-8, *supra*).[2]

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2. The District Court's denial of Dr. Dayton's Rule 33 motion for a new trial does not preclude the present coram nobis petition raising ineffectiveness of counsel, for 3 reasons:

First, the burden of proof on an ineffectiveness claim is far lower than on a Rule 33 motion because the lack of effective trial counsel undermines the presumption of validity attached to a criminal proceeding. *Strickland v. Washington*, *supra*, 466 U.S. at 694, 104 S. Ct. at 2068 (1984) ("the newly discovered evidence standard [under Rule 33] is not an apt source from which to draw a prejudice standard for ineffectiveness claims . . . [because] [a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower").

Second, the ineffectiveness claim is predicated on trial counsel's default in seeking the testimony of co-defendants whose credibility is for the jury, not the judge. *U.S. v. DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) (because of the Sixth Amendment jury guarantee, "credibility is for the jury" on a motion to seek co-defendant testimony). The judge's assessment of credibility is not binding on a coram nobis petition asserting ineffectiveness of counsel.

Third, post-trial counsel who made the new-evidence motion were themselves incompetent; they admitted in writing their total ignorance of the coram nobis remedy for ineffective trial counsel (p. 12, *infra*).

(Cont'd)

Dr. Dayton repeatedly implored his post-trial counsel to redress the obvious incompetence of his trial counsel. However, post-trial counsel gave Dr. Dayton erroneous advice in writing that he had no remedy for trial counsel's incompetence because he (Dr. Dayton) was never imprisoned. Post-trial counsel believed (erroneously) that habeas corpus was the only remedy for ineffective assistance of trial counsel and that, because Dr. Dayton was never imprisoned and could not invoke habeas relief, he had no remedy. They ignored coram nobis relief. Post-trial counsel wrote to Dr. Dayton:

> The statute that provides for post-conviction relief for ineffective assistance of counsel is 28 USC 2255. However, that section only provides relief for "a prisoner in custody." . . . Since you cannot be deemed "in custody", the statute does not apply to you. We are aware of no other recourse to assert ineffective assistance of counsel at this time.

(10/4/90 letter to Dr. Dayton; 11th Cir. exp. doc. 160 at exh. A).

This was inept advice, ignoring coram nobis relief under 28 U.S.C. § 1651. *U.S. v. Morgan*, *supra* (coram nobis available under 28 U.S.C. § 1651 to redress denial of counsel where habeas unavailable). Post-trial counsel, ignorant of coram nobis relief, continued to represent Dr. Dayton until 1996.

(Cont'd)

This led the trial judge to excuse Dr. Dayton's delay in seeking coram nobis relief because post-trial counsel also were incompetent (App. B at 4a-5a).

For each of these 3 reasons, the District Court's denial of Dr. Dayton's new-evidence motion (App. C) does not preclude the present coram nobis petition.

In 1996 Dr. Dayton discharged his post-trial counsel and retained present counsel who filed the coram nobis petition. The District Court dismissed the petition on its face in March 1998 (App. B). Although the District Court rejected the petition, it held the petition timely because the incompetence of post-trial counsel concealed the availability of coram nobis relief from Dr. Dayton (App. B at 4a-5a). *Blanton v. U.S.*, 94 F.3d 227, 231-32 (6th Cir. 1996) (incompetence of post-trial counsel excuses delay in seeking coram nobis).

Dr. Dayton appealed to the Eleventh Circuit. The Eleventh Circuit summarily affirmed (App. A). Although the Eleventh Circuit did not explain its affirmance, the government's argument before the Eleventh Circuit suggests the likely bases for its decision. In the Eleventh Circuit, the government argued that: (1) coram nobis is no longer available after this Court's decision in *Carlisle v. U.S.*, *supra* (govt br. in 11th Cir. at 11-12), and that (2) coram nobis was not available as a post-trial remedy for ineffective assistance of trial counsel (*id.*, at 16). Based upon these arguments by the government, the Eleventh Circuit summarily affirmed the dismissal of Dr. Dayton's coram nobis petition (App. A).

Dr. Dayton now seeks certiorari to clarify this Court's misleading suggestion that coram nobis is no longer available, and to clarify that coram nobis is available to remedy the ineffective assistance of trial counsel.

E. Basis for Federal Jurisdiction in the District Court

The District Court has jurisdiction over the coram nobis petition by reason of 28 U.S.C. § 1651(a) (All Writs Act) and ancillary jurisdiction. *U.S. v. Morgan*, *supra*, 346 U.S. 502, 74 S. Ct. 247 (1954) (District Courts have jurisdiction over post-conviction petition for coram nobis under 28 U.S.C. § 1651).

REASONS FOR GRANTING THE WRIT

There are two compelling reasons for granting the writ. First, this Court's suggestion in *Carlisle* that coram nobis is no longer available is misleading. It overlooks the need for coram nobis as the *only* post-trial remedy for Sixth Amendment counsel violations for an entire class of defendants, and warrants clarification to avoid misleading the lower courts into denying the only remedy available.

Second, guidance from this Court is necessary to reaffirm that ineffective counsel is a fundamental defect in a criminal trial sufficient to warrant coram nobis relief.

A.

CERTIORARI IS APPROPRIATE TO CLARIFY THIS COURT'S MISLEADING SUGGESTION 3 YEARS AGO IN *CARLISLE* THAT CORAM NOBIS IS NO LONGER NECESSARY OR APPROPRIATE

As mentioned above, this Court in *Carlisle* suggested that coram nobis is no longer available as a post-trial remedy in federal criminal practice. This Court's suggestion in *Carlisle* is unfortunate and misleading. This Court reasoned that the Federal Rules of Criminal Procedure are so comprehensive in their provision of post-trial remedies that coram nobis is not likely to be needed. *Carlisle v. U.S.*, *supra*, 517 U.S. at 429, 116 S. Ct. at 1467 ("As we noted a few years after enactment of the Federal Rules of Criminal Procedure, it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate").

But *Carlisle* makes this suggestion without considering the plight of an entire class of defendants — defendants not subject to

imprisonment or custody who are denied effective counsel at trial. For these non-custodial defendants, coram nobis is the *only* remedy available. The ineffectiveness of trial counsel often does not appear quickly enough to raise on direct review which, in any event, is often handled by trial counsel who clearly will not raise their own incompetence at trial. Nor is habeas corpus available to non-custodial defendants; they do not satisfy the "in custody" requirement under 28 U.S.C. § 2255. *U.S. v. Michaud*, 901 F.2d 5 (1st Cir. 1990). Nor do the Federal Rules of Criminal Procedure provide a remedy. Indeed, for non-custodial defendants who are denied effective assistance of counsel at trial, coram nobis is the *only* remedy. No other remedy exists.

The danger and harm are obvious. Guided by *Carlisle*, the federal Bench likely will be quick to dismiss coram nobis petitions, or at best treat them as a fringe remedy, following the disfavored status which *Carlisle* conveys. Non-custodial defendants who have no other remedy for their ineffectiveness claims will suffer immeasurable harm from wrongful convictions, and will lack any remedy whatsoever, under this Court's misleading suggestion in *Carlisle* that coram nobis is unnecessary.

That is exactly what happened here. Following the government's argument that coram nobis was no longer available under *Carlisle* (govt br. in 11th Cir. at 11-12), the Eleventh Circuit summarily affirmed the dismissal of Dr. Dayton's coram nobis petition (App. A). Dr. Dayton, without a remedy, suffered a huge fine, the stigma of felony conviction, and professional disqualification.

This is a harmful and inevitable consequence of *Carlisle*, and the likely fate for defendants like Dr. Dayton. The prominence of *Carlisle*, in interpreting the ever-popular Rule 29, Fed. R. Crim. P., augurs misapplication by the federal Bench in following its misguided suggestion that coram nobis

is no longer "appropriate or necessary". Certiorari is necessary to reaffirm the availability of coram nobis as the *only* remedy for non-custodial defendants who are denied the effective assistance of counsel, against the contrary and misleading suggestion in *Carlisle*.

B.

CERTIORARI IS APPROPRIATE TO REAFFIRM THAT INEFFECTIVE ASSISTANCE OF COUNSEL IS A FUNDAMENTAL DEFECT IN A FEDERAL CRIMINAL TRIAL SUFFICIENT TO WARRANT CORAM NOBIS RELIEF

Ineffective assistance of counsel is a fundamental defect in a criminal trial. It is tantamount to no counsel at all and deprives the accused of fundamental protections necessary to protect all other rights at trial. *U.S. v. Cronic*, 466 U.S. 658, 656, 104 S. Ct. 2039, 2045 (1984) ("Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself"). Because the effectiveness of trial counsel is fundamental, many courts have taken the position that coram nobis is available for ineffectiveness claims. *U.S. v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) ("an individual no longer in custody may employ the rarely-used writ of coram nobis to make a Sixth Amendment [ineffective] assistance of counsel attack on his conviction"); *Morgan v. U.S.*, 396 F.2d 110, 111 & n.1 (2d Cir. 1968) (coram nobis available for ineffectiveness of counsel).

The government and Eleventh Circuit, however, took a different approach. The government argued that ineffectiveness claims are not worthy of treatment as no-counsel claims, and pointed to this Court's holding in *Custis v. U.S.*, 511 U.S. 485, 496, 114 S. Ct. 1732, 1738 (1994) (in sentence enhancement proceeding, collateral attack permitted against prior conviction

on no-counsel grounds, but not on ineffectiveness grounds). But *Custis* has no bearing here. *Custis* turned on the unique statutory nature of the sentence enhancement proceeding which, by definition, occurred after a *second* conviction and thus has more significant finality concerns with "an independent purpose other than to overturn the prior judgment". 511 U.S. at 497, 114 S. Ct. at 1739. That is not the case here, where Dr. Dayton directly challenges his conviction in a coram nobis proceeding whose very purpose is to overturn the conviction.

The unique statutory nature of the sentence enhancement proceeding, discussed in *Custis*, should not detract from the fundamental defect of ineffective counsel, *U.S. v. Cronic*, *supra*, or from the need for coram nobis to remedy counsel's ineffectiveness where a defendant is not in custody. *U.S. v. Mett*, *supra*; *Morgan v. U.S.*, *supra*. Effective trial counsel is a fundamental protection. Except for coram nobis, there is no remedy to protect this fundamental right for non-custodial defendants.

Certiorari is appropriate to make this clear. This Court's suggestion in *Custis* that ineffectiveness claims are somehow not "fundamental" must be clarified and limited to the unique statutory context of the sentence-enhancement proceeding which *Custis* involved. Otherwise, ineffectiveness claims may be trivialized and rendered unremediable, hurting innocent defendants with the *total* lack of remedy for serious constitutional violations.

The Eleventh Circuit's summary affirmance follows the government's misuse of *Custis* to assert that ineffectiveness of counsel is not a fundamental defect warranting coram nobis relief. This warrants certiorari to reaffirm the fundamental defect inherent in ineffective counsel and the need to preserve the coram nobis remedy for non-custodial defendants who have no other remedy for this serious defect in federal criminal proceedings.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari. Coram nobis is the *only* remedy for non-custodial defendants who are denied effective assistance of counsel. Direct review is usually unavailable. Habeas relief is not available because the defendant is not "in custody". And the Federal Rules of Criminal Procedure fail to provide a remedy. Without coram nobis relief, there is no remedy for non-custodial defendants who are denied effective assistance of counsel.

This Court's misleading suggestion in *Carlisle v. U.S.*, that coram nobis relief is no longer "necessary or appropriate", is an unfortunate overstatement. *Carlisle* ignores the essential nature of coram nobis relief for non-custodial defendants who have no remedy in habeas corpus or under the Federal Rules of Criminal Procedure. Without coram nobis, non-custodial defendants are left without a remedy for convictions wrongfully obtained under ineffective counsel.

So too, this Court's analysis of ineffectiveness claims in *Custis v. U.S.* must be limited to the specific statutory context of enhanced sentence proceedings, on which *Custis* focused. Enhanced sentence proceedings raise unique concerns about ineffectiveness claims which do not apply when they are litigated in their own right, in a coram nobis proceeding. This Court should underscore the fundamental nature of effective counsel, and the coram nobis remedy to protect it, which *Custis*

was not intended to defeat. Certiorari is warranted to clarify these matters and properly guide the federal Bench.

Respectfully submitted,

DENNIS GROSSMAN
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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4565
Non-Argument Calendar

D. C. Docket Nos. 97-1716-CV-JCP
85-695-CR-JCP

MARTIN DAYTON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 30, 1998)

Before TJOFLAT, EDMONDSON and MARCUS, Circuit Judges.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs to be taxed against petitioner-appellant.

Judgment Entered: October 30, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 14, 1998 AND FILED MARCH 16, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Case No. 85-695-CRIM-PAINE)
Case No. 97-1716-CIV-PAINE

UNITED STATES OF AMERICA

Plaintiff-Respondent,

v.

MARTIN DAYTON,

Defendant-Petitioner.

ORDER ON MARTIN DAYTON'S VERIFIED PETITION FOR WRIT OF ERROR CORAM NOBIS

THIS CAUSE is before the Court upon the verified petition of Martin Dayton for a writ of error *coram nobis*. The writ in question is a post-conviction remedy available in a federal district court to challenge a criminal conviction. *United States v. Morgan*, 346 U.S. 502, 510-11 (1954); *Grene v. United States*, 448 F. 2d 720, 720-21 (5th Cir. 1971) (per curiam).[1]

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1. Under *Bonner v. City of Pritchard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Appendix B

In the instant case, defendant-petitioner argues that because he was never in custody, either by prison or custodial supervision, *coram nobis* is the only available form of relief to avoid the collateral consequences of his federal conviction. The civil consequences of his conviction, as set forth in Dayton's petition, are a $62,000 fine ($56,000 was actually restitution to Cincinnati Insurance Company, and the remaining $6,000 two fines) imposed on him, and the fact that he is "subject to "discipline, and to disqualification from participating in Florida's medicaid program and managed care programs" [Verified Petition for Writ, page 2, paragraph.4]. According to the petition he is currently a licensed osteopathic physician.

Timeliness of Filing the Petition

As a preliminary procedural matter, this Court must examine the timeliness of the petition. It was filed on May 30, 1997, almost twelve years after the verdict against Dayton was returned and an appeal was filed, and many years after motions for a new trial were filed on Dayton's behalf. The question of whether the doctrine of laches here acts as a bar to review of the instant petition must, therefore, be considered.

Dayton asserts that his failure to previously raise the claims set forth in the instant petition, either by direct appeal or by petition for a writ of error *coram nobis,* is directly attributable to ineffective assistance of counsel, as are the substantive claims currently before this Court. In order to reach the issues in the petition, this Court must, for the moment, accept petitioner's assertion.

He states that the last of his previous three attorneys remained as his counsel until 1996. Dayton's appeal of his

conviction to the 11th Circuit was concluded in 1989 and that the Supreme Court denied certiorari the same year. Dayton's third attorney filed a Rule 33 Motion for New Trial on March 19, 1991. It was initially denied as untimely which, in turn, deprived the trial court of jurisdiction. That ruling was appealed and ultimately the matter was sent back to the trial court for a hearing. Following said hearing, the Motion for New Trial was denied by order dated October 3, 1995. The docket sheet shows nothing between October of 1995 and the filing of the instant petition. Evening assuming the ineptitude of previous counsel, this still leaves unaccounted-for a period of one year and seven months. The petition does not specify *when* in 1996 previous counsel ceased representation, nor when current counsel was retained.

This Court agrees with the Sixth Circuit's position that the doctrine of laches should apply to coram nobis proceedings lest the time limit for bringing coram nobis claims become completely open-ended. See *Blanton v. United States*, 94 F. 3d 227, 230 (6th Cir. 1996). Too long a delay in bringing such a claim should, in this Court's opinion, be a bar to such claims.

That being said, however, here, as in *Blanton*, the coram nobis petition involves claims of ineffective assistance of counsel. Those claims obviously would not have been brought by the three attorneys in question if, in fact, each offered ineffective counsel, as petitioner alleges. Current counsel's representation commenced, at most, one year and seven months prior to the filing of the instant petition. Because the effective assistance of counsel is so important and paramount a right for a criminal defendant, the interests of justice would seem to demand that the petition be found — in this particular case — not to be barred by laches.

Appendix B

Ineffective Assistance of Counsel

Six of the eight claims set forth in Dayton's petition allege ineffective assistance of counsel. While the writ of error *coram nobis* traditionally was invoked to remedy errors of fact, *United States v. Addonizio*, 442 U.S. 178, 186 (1979) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914), there is federal precedent whereby a petition for the writ has served as the procedural vehicle for ineffective assistance claims. *Blanton v. United States*, 94 F. 3d 227 (6th Cir. 1996); *Morgan v. United States*, 396 F. 2d 110 (2nd Cir. 1968).

The Sixth Amendment right to counsel is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. The essential inquiry by which to judge any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *United States v. Cronic*, 466 U.S. 668, 669 (1984).

The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. Id. at 687, citing *Trapnell v. United States*, 725 F. 2d 149, 151-152 (2d Cir. 1983). Dayton, therefore, must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. at 669. A court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

Where the claim is of actual ineffectiveness, a simple showing of deficient performance by counsel is not enough; Dayton must also affirmatively prove that any such deficiency was prejudicial to the defense. The required showing of prejudice demands a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. Id. at 694. That reasonable probability must be sufficient to undermine confidence in the outcome *Id.* The question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.

The Court deciding an ineffectiveness claim must consider the totality of the evidence before the jury. The Court must look at the acts or omissions of counsel identified by the defendant to determine whether, in light of all the circumstances, they were outside the wide range of professionally competent assistance. In so determining, the court should keep in mind that counsel's function is to make the adversarial testing process work in the particular case, while recognizing the strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Under *Cronic*, the ultimate focus for the Court is on the fundamental fairness of the proceeding whose result is being challenged. A Court may examine lack of sufficient prejudice to defendant before deciding on the deficiency of counsel's performance if that is an easier means of disposition of the claim.

Appendix B

The important policy considerations set forth in *Cronic* must be borne in mind when claims of ineffective assistance of counsel are raised:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. *United States v. Cronic*, at 689.

With the foregoing in mind, the Court turns to the specific ineffective assistance claims set forth in the petition:

1. counsel's failure to protect Dayton's due process rights to have the element of criminal intent/scienter proven by requesting a curative charge;

2. counsel's failure to protest the government's use of 1984 photographs of a burn to show what Dayton should have known about the burn in 1982;

3. counsel's failure to seek severance or a limiting instruction to protect Dayton against prejudice from evidence of the Sayegh's prior insurance and mail fraud convictions;

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4. counsel's failure to seek severance or a "double jury" for Dayton so as to allow him to subpoena the Sayeghs as witnesses in his defense;

5. counsel's failure to assert Dayton's fifth amendment due process rights against a discriminatory use of witness immunity and his due process right to equal process for obtaining evidence;

6. counsel's failure to protect Dayton's sixth amendment right to subpoena the Sayeghs as essential witnesses by failure to protest the govt's conditioning of a Sayegh plea on a plea from Dayton as well;

7. The court's failure to protect petitioner's rights by either preventing or curing the government's improper use of a civil-law standard, the 1984 photographs, and evidence of the Sayeghs prior frauds and convictions; and

8. Denial of fifth amendment due process by being deprived of an impartial tribunal.

Because the seventh claim arises, in turn, out of claims one, two and three, it shall be treated together with those claims.

1. *Counsel's failure to protect Dayton's due process rights to have the element of criminal Intent/scienter proven by requesting a curative charge.*

Under this claim, petitioner says that the government, both in its presentation of expert testimony and in its summation, improperly used the standard of "should have known" while the charges of conspiracy and mail fraud, of which Dayton was

accused, required proof of intent. The government, he argues, thus equated negligence ("should have known") with intent, thereby allowing the jury to convict him under a lesser standard of proof than that required by law.

The expert testimony to which Dayton refers is that of Dr. Walter Mullin, a plastic surgeon called as a government witness. The "summation" is that portion of the prosecution's closing argument which referred back to Dr. Mullin's testimony.

There is no doubt that both mail fraud and conspiracy to commit mail fraud require proof of willfulness, knowledge and intent. However, on its face, there is nothing in the testimony and summation extracts offered by petitioner that even arguably touches upon the element of intent pertaining to the charge of mail fraud. As far as its impact on the conspiracy count against Martin Dayton, this Court has carefully examined the entire record and finds the claim unsubstantiated.

Dr. Mullin's testimony was never intended to be direct evidence of Dayton's knowledge or his intent. Indeed, unless he could divine the inner thoughts of Dayton, or had been told directly by Dayton what he knew, there is no legitimate way in which Dr. Mullin could testify as to the state of mind, the intent and/or the knowledge of Martin Dayton.

Dr. Mullin was called as an expert to offer opinion testimony as to what he saw when he examined and compared photographs of a 1978 burn victim with photos of the burn victim who consulted him in 1984. His testimony consisted of points of comparison between the two sets of photos which led him to believe that the 1978 burn and the 1984 burn were one and the same. It was in this context that he was asked if, in his

opinion, someone, not a specialist, but instead, running a family practice, could be able to distinguish an older burn from a fresh burn. His response was: "I would hope any physician could." His testimony was merely designed to raise the permissible inference that there was one burn victim and one burn, that burn having occurred in 1978.

The government's proof of Martin Dayton's fraudulent intent was by inference, a permissible method of proof where a series of seemingly isolated acts and incidents are sufficiently numerous. The prosecution offered evidence of Martin Dayton's prior relationship with his co-defendants of his practice of creating files and made progress notes on all of his patients, of the existence of such files and progress notes on his two co-defendants but not on the burn patient he supposedly examined in 1982 and who he referred to as Micial/Michelle Nukian. It also presented evidence that, although he testified that it was the worst burn he had ever seen, he wrote out no prescription, made no suggestion of hospitalization and took no photograph. The government's evidence also showed that in 1984 he did create a file on the burn victim, did take a photo, and did write a case summary, relying on his co-defendant to supply the date of the previous visit, which date, he testified, he did not recall. He told the government he wrote the case summary at his co-defendant's request and never asked her what it was for. Add to this, Dr. Mullin's testimony about the 1978 burn photos and the 1984 burn photos, and the jury clearly had sufficient evidence to find that Martin Dayton knowingly and intentionally participated in the scheme to defraud the Cincinnati Insurance Company.

At the conclusion of the trial the jury was charged with the standard criminal instructions as to knowledge and intent. Both

the trial court and, on appeal, the eleventh circuit, found that the evidence adduced at trial was sufficient to prove that Martin Dayton knowingly and intentionally participated in the scheme to defraud the Cincinnati Insurance Company.

Therefore, there was no ineffective assistance of counsel based upon his failure to object to or to seek a curative instruction on the expert testimony and summation language in question.

2. *Counsel's failure to protest the government's use of 1984 photographs of a burn to show what Martin Dayton should have known about the burn in 1982.*

Petitioner Dayton argues that the government introduced 1984 photographs of a female burn victim in order to show that Dayton should have known about the burn in 1982. However, a careful examination of the trial transcript makes it clear that the government introduced those photographs and elicited testimony from its expert witness, Dr. Mullin, to prove that there was one female burn victim and one burn concerned. The defense strategy of Dayton was that there were two burn victims — Nancy Manoukian and Micial Nukian — and two burns or, alternatively, that there was one burn victim who had suffered two separate burns. Dayton's trial attorney presented his own expert witness, Dr. Gilbert Snyder, a plastic surgeon with impressive credentials. That witness cast doubt on the issue of whether there was only one burn victim. Had the jury believed defendant's expert, defendant would have considered himself well served by the introduction of the photos. Under the circumstances, we can find no ineffective assistance arising out of defense counsel's failure to object to the introduction of the 1984 photos.

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3. *Counsel's failure to seek severance or a limiting instruction to protect Martin Dayton against prejudice from evidence of the Sayeghs' prior insurance and mail fraud convictions.*

The Court next considers petitioner's assertion of ineffective assistance by virtue of trial counsel's failure to seek either severance or a limiting instruction to protect Dayton against prejudice due to the government's use of evidence as to the Sayeghs' prior insurance frauds.

The indictment in the case consisted of nine counts. The petitioner-defendant Dayton was named in Count IX, conspiracy to commit mail fraud, and in Counts V and VI, two separate counts of mail fraud. Dayton was found guilty only as to the conspiracy count and as to one count of mail fraud. He was acquitted of an additional mail fraud count (Count V).

The government's closing argument made a careful delineation of the charges against both the Sayeghs and Dayton, and those that applied only to the Sayeghs. In his closing argument, Dayton's attorney further emphasized the need for the jury to separately consider the case against his client, as opposed to the evidence against the Sayeghs.

The jury was obviously quite able to distinguish between the evidence against the Sayeghs and the evidence that applied to Dayton. Indeed, the jury, by acquitting Dayton on Count V, went further, rejecting the government's evidence from claims adjustor Defendini that Dayton's medical case summary was contained in an envelope bearing the return address of Dayton's medical center. It has been reasoned that if the jury is able to dissect the evidence, apply the relevant evidence to the pertinent defendant and render a fair and impartial verdict as to each

individual defendant, then there is no compelling prejudice. *United States v. Khoury*, 901 F. 2d 948, 966 (11th Cir. 1990). The specter of prejudice being wholly absent, there was no basis upon which Dayton's trial attorney would have sought severance on this theory.

Dayton's trial attorney actually made good strategic use of the evidence of the Sayegh's previous insurance frauds to show that his client, Dayton, was another in a series of innocent victims taken in by the Sayeghs. Such a strategy, considering all the circumstances, was that of reasonably effective assistance of counsel.

4. *Counsel's failure to seek severance or a "double jury" for Dayton so as to allow him to subpoena the Sayeghs as witnesses in his defense.*

The Court next examines petitioner's argument that it was ineffective assistance of counsel for his trial attorney to fail to move for severance so as to give Dayton the benefit of exculpatory testimony from the Sayeghs, to wit, that Dayton was ignorant of their scheme to defraud the Cincinnati Insurance Company.

As a starting point in considering severance, the general rule in conspiracy cases is that defendants indicted together should be tried together for the sake of judicial economy. *United States v. Bovain*, 708 F. 2d 606, 608 (11th Cir. 1983), citing *United States v. Lipner*, 676 F. 2d 456, 464 (11th Cir. 1982).

The trial transcript reveals that Dayton's trial attorney brought up the issue of severance of defendants several times during the trial. His position was that Dayton was going to argue

that co-defendant Susan Sayegh brought a female burn victim to his office in March of 1982. The proffer of Susan Sayegh's testimony was, essentially, that there were two girls and two burns, and that she was never at Dayton's office in 1982, only in 1984. Dayton's trial attorney saw these as clearly antagonistic defenses, which, in order to vigorously represent his own client, would pit Martin Dayton, as well as the government, against the Sayeghs. He felt the Sayeghs should be severed out, with Dayton continuing on in the trial. If the Sayeghs, rather than Dayton, were severed, he argued, judicial economy would be preserved. The Sayeghs were prepared to plea, he believed; thus, if Dayton stayed in and the Sayeghs entered pleas, there would only have been one trial.

The government submitted a very new case styled *United States v. Jonas* (no cite provided), which appeared to hold that unless all co-defendants were to testify at trial, the issue of antagonistic or mutually exclusive defenses would not arise at all and severance would not be appropriate. In fact, neither Susan nor Elias Sayegh testified at trial. Only Dayton took the stand.

There is nothing in the record that even suggests that the Sayeghs were prepared to offer exculpatory testimony on Dayton's behalf at the time this trial was occurring — no proffer or other showing that such a proffer of testimony would materialize, no affidavits, not so much as a remark in passing by any of the defense counsel other than Dayton's. This is despite the fact that several discussions regarding the subject of severance took place during trial outside the presence of the jury. Nor has petitioner offered anything more than his assertion that he desired their testimony. Where the possibility of a co-defendant's testifying is merely colorable or there is no

showing that it is anything more than a gleam of possibility in the defendant's eye, severance is not required. *Byrd v. Wainwright*, 428 F. 2d 1017, 1021 (5th Cir. 1970) and cases cited therein. It is difficult to find any basis on which current counsel can legitimately argue that trial counsel should have been moving for severance on this ground.

This Court is unpersuaded by the argument that because Elias Sayegh so testified at a hearing on a Motion for New Trial, he meant to do so at Dayton's original trial. First, the motion for new trial, filed on March 19, 1991, almost five years after the trial, asserted that the Sayeghs testimony was "newly discovered" evidence. Under Rule 33's five-part test, such evidence must be discovered *following* trial. Second, the new trial hearing took place nine years after the trial. Third, it is clear from the transcript of the hearing that the Sayeghs appeared at that time with the greatest reluctance. Finally, the credibility that could be given to individuals whose entire criminal *modus operandi* consisted of lies and false identities, is extremely questionable. Indeed, the allegedly exculpatory testimony offered by Elias Sayegh at the new trial hearing was considered by this Court and found wholly unpersuasive (Petition, Exhibit C).

Thus, this court finds no merit in the argument that trial counsel's failure to argue this at trial constituted ineffective assistance of counsel.

Appendix B

5. *Counsel's failure to assert Martin Dayton's fifth amendment due process rights against a discriminatory use of witness immunity and his due process right to equal process for obtaining evidence.*

Under this claim, the petitioner argues ineffectiveness of counsel by virtue of his failure to protest the prosecution's grant of immunity to its own witness, without making it available to Martin Dayton for his own defense witnesses.

The government provided witness Theresa di Buono[2] with immunity. At trial, she testified to several New Jersey insurance fraud schemes devised by the Sayeghs in which she participated. These schemes pre-dated the mail fraud with which Martin Dayton was charged. The government sought her evidence in order to demonstrate that the two Sayeghs knew and had previous experience in devising a scheme by which to defraud an insurance company.

The grant of immunity by a prosecutor is governed by 18 U.S.C. Sec. 6002 *et seq*. This Court agrees with the government's position that the grant of statutory use immunity to a defense witness is the exclusive province of the Executive branch. *United States v. Herbst*, 641 F. 2d 1161, 1168 (5th Cir. Unit B 1981) cert. denied 454 U.S. 851 (1981) and cert. denied sub nom. *McGowan v. United States*, 454 U.S. 851 (1981); *United States v. Mohney* 949 F. 2d 1397 (6th Cir. 1991). The statute affords the prosecutor considerable discretion to request immunity when the prosecution, in its judgment, deems it necessary in the public interest. *United States v. Mohney*, citing

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2. This witness was formerly known as Theresa Buono and Theresa Bocchino.

United States v. Hooks, 848 F. 2d 785, 798 (7th Cir. 1988). The statute does not require the government to grant a defense witness immunity. Id. at 799.

While the petitioner appears to concede this, he poses the novel argument that such a right, though not a given, may arise. As authority for his argument, he cites the case of *Wardius v. Oregon*, 412 U.S. 470 (1973). However, we find it wholly unpersuasive. *Wardius* clearly pertained only to the pre-trial discovery stage of a criminal proceeding. That case involved review of a "disclosure of alibi" statute. Its holding has never been extended to the trial of a defendant, much less to a perceived "entitlement" by the defense to witness immunity under the theory of equal process for obtaining evidence.

Nor does this court accept petitioner's argument for immunity of essential defense witnesses under the minority view of *Government of Virgin Islands v. Smith*, 615 F. 2d 964 (3d Cir. 1980). The majority of federal circuits, including the Eleventh, have declined to fashion a doctrine of inherent power of the federal court to confer judicial use immunity under the so-called "effective defense" theory. *United States v. Herbst*, 641 F. 2d 1161, 1169 and cases cited therein; *United States v. Mohney*, *United States v. Sawyer*, 799 F. 2d 1494 (11th Cir. 1986), cert. denied sub nom., *Leavitt v. United States*, 479 U.S. 1069 (1987).

We find nothing in either the record or in petitioner's argument to justify deviating from the majority view. The government properly invoked its authority to confer immunity upon Theresa di Buono. Her testimony, which this Court reviewed in its entirety, had nothing to do with Martin Dayton. It in no way presented even the potential for a distortion of the fact-finding process.

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The government's strong interest in prosecuting the Sayeghs — even under the minority view's "effective defense" theory — would have presented a countervailing interest which would preclude a grant of immunity.

This Court finds no grounds under this claim to justify a finding of ineffective assistance of counsel.

6. Counsel's failure to protect Dayton's sixth amendment right to subpoena the Sayeghs as essential witnesses by failure to protest the government's conditioning of a Sayegh plea on a plea from Martin Dayton as well.

Under this claim, petitioner asserts that "upon information and belief" the prosecution offered the co-defendants Sayegh a plea, conditioned on a plea by Martin Dayton as well. This, he maintains, deprived him of their testimony in his defense. Had the Sayeghs been allowed to plea independently, they could have been subpoenaed by Martin Dayton to testify on his behalf.

No defendant has a constitutional right to plea bargain and a prosecutor need not do so if he/she prefers to go to trial. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). It is the prosecution's prerogative whether or not to offer a "package deal" or no deal at all. See *United States v. Wheat*, 813 F. 2d 1399, 1405 (9th Cir. 1987), aff'd. 486 U.S. 153 (1988). If the Sayeghs themselves had no constitutional right to a certain plea, Martin Dayton cannot be said to have standing to protest the plea offered to his co-defendants. Again, there is nothing in the record to support his conjecture that the Sayeghs would have offered exculpatory testimony on his behalf under subpoena had they entered into a plea agreement. Thus, he presents no evidence that failure to protest the purported

condition on the Sayeghs' pleas constituted ineffective assistance of counsel.

8. Denial of Martin Dayton's fifth amendment due process by being deprived of an impartial tribunal.

Under this final claim, petitioner reasons that he was deprived of an impartial tribunal in his 1986 case because it was before former federal Judge Alcee Hastings, who was later removed from the bench by impeachment proceedings before the United States Congress by reason of taking bribes and corruption relating to a period of time substantially contemporaneous with the trial in this case. Hastings, he claims, thus had an incentive to overlook violations of petitioner's rights and, in fact, did so overlook them.

We rely on the facts supplied by the government to the effect that Alcee Hastings was indicted in December of 1981 on a charge of conspiracy to solicit and accept a bribe. After trial by jury on February 4, 1983, he was acquitted. Thereafter, members of the Eleventh Circuit's Judicial Council filed a complaint under the Judicial Disabilities Act (28 U.S.C. Secs. 331, 332, 372 (c), 604 (h). A report issued some three and one half years later, and was sent to the Judicial Conference of the United States. After meeting on March 17, 1997, the Council concurred with the findings and recommended impeachment. On August 3, 1988, the House adopted seventeen articles of impeachment against him. On October 20, 1989, he was convicted on eight articles; acquitted on three, and no vote was taken on six other articles. We note that the impeachment proceeding was later dismissed in *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992). That decision, however, was vacated and remanded *Hastings v. United States*, 988 F. 2d 1280

(D.D.C. 1993). On remand, it was held that the Senate procedures for trying impeachment presented a non-justiciable political question and, therefore, Alcee Hastings could not seek judicial review of his claim that his impeachment violated a constitutional requirement to be tried by the full Senate.

This Court has reviewed both *Bracey v. Gramley*, __ U.S. __, 117 S. Ct. 1793 (1997) and in re: *Lopez-Lukis*, 113 F. 3d 1187 (11th Cir. 1997). In *Bracey*, the judge in question was convicted on federal charges of taking bribes from criminal defendants, subsequent to the time that William Bracey was tried, convicted and sentenced to death in his court. Bracey claimed that at the time of his trial, the judge had an interest in deflecting attention from his bribe-taking in other cases by letting Bracey be convicted, and that said interest violated Bracey's fair-trial guarantee under the Due Process clause. The Supreme Court found that the public trial and conviction of that trial judge showed he was thoroughly corrupt. *Bracey v. Gramley*, at 1795. Additional evidence supported the claim that the judge was biased in Bracey's case. These showings, the Court held, established "good cause" to conduct discovery as to whether, in fact, actual judicial bias might be established.

Alcee Hastings was acquitted in 1983 of charges of soliciting and accepting a bribe in return for a reduction of prison sentence and revocation of a forfeiture order. Although impeachment proceeding ensued, these were political, not judicial, in nature, which distinguishes Hastings from the judge in *Bracey*. Dayton's trial occurred in July of 1986, subsequent to Hastings' acquittal, which further distinguishes it from *Bracey*. Even if the reasoning of *Bracey* were to be extended to a judge against whom impeachment proceedings are brought, Dayton has raised no judicial act during his trial, nor have we

found any in the trial or post-trial record that could be argued to constitute a factual showing that would establish good cause for further examining a claim for judicial bias in his case.

Under the government's case, In re: *Lopez-Lukis*, the Eleventh Circuit required a showing of "clear abuse" of discretion or usurpation of judicial power before granting a writ of mandamus whereby a trial judge would be forced to recuse himself.

Petitioner has failed to meet either case's required showing or to otherwise show prejudice to his right to a fair trial by being in then-Judge Hastings' courtroom. This Court finds the eighth claim of petitioner to be without merit.

In sum, none of the claims presented by the petitioner Martin Dayton are held to warrant the issuance of a writ of error *coram nobis*. Therefore, it is hereby

ORDERED and ADJUDGED that Martin Dayton's verified Petition for a Writ of Error *coram nobis* is **DENIED**.

DONE and ORDERED this 14th of March, 1998.

s/ James C. Paine
James C. Paine
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED OCTOBER 3, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-0695-CR-Paine

UNITED STATES OF AMERICA,

v.

MARTIN DAYTON,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Before the court is the motion of the defendant, Martin Dayton, for a new trial of this cause based upon newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This motion was denied by this trial court on the finding that it had been untimely filed. The order denying was appealed to the Eleventh Circuit which reversed, holding that the motion had been timely filed. The case has been remanded for an evidentiary hearing on the motion for new trial. In preparation for that hearing the request of the government for a medical examination of a prospective witness, Nancy Manoukian Sayegh, was granted. Dr. Walter Mullin was appointed to examine this witness. That examination was carried out and a report to the court and counsel for the parties and the witness made by Dr. Mullin. The examination occurred on June 26, 1995. On September 28, 1995 a hearing was held in West

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Palm Beach commencing at 10:00 A.M. Defendant was represented by Stephen J. Goldstein, Esq. The government was represented by AUSA Laura Bonn, Esq. Bruce Kessler, Esq. appeared for witnesses, Elias Sayegh, Sonia Sayegh and Nancy Sayegh. These three witnesses were presented by counsel for the defendant and movant. Other evidence considered by the court includes the report of Dr. Walter Mullin which was introduced without objection and marked government exhibit 1 Mullin. Certain exhibits offered at the trial of the defendant were also considered by the court. These included a photograph of Nancy Sayegh taken in 1978, marked government exhibit N.H.1, a photograph of Nancy Sayegh taken in 1984, marked government exhibit N.H.2 and a report authored by the defendant, Martin Dayton on stationery of Medical Center, Sunny Isles dated May 16, 1984, marked government exhibit 20 A-4. The testimony of the witnesses, the exhibits and argument of counsel were considered by the court together with applicable principles of law.

At earlier times there was an issue as to whether or not the witness, Nancy Sayegh is the same person as Micial Nukian. The government has taken the position that these persons are one and the same. At the hearing, counsel for the defendant conceded that that position is correct. That issue, therefore, has become moot.

Counsel agreed at the hearing that in order for the defendant to prevail on his motion for new trial he must meet the following criteria under Rule 33 of the Federal Rules of Criminal Procedure:

1. The evidence must be newly discovered and have been unknown to the defendant at the time of trial.

2. The evidence must be material and not merely cumulative or impeaching.

3. The evidence must be of the type that will probably produce an acquittal.

4. The defendant's failure to learn of the evidence must not be the result of lack of diligence.

Failure to meet any one of these criteria will defeat the motion for new trial. *United States v. Starrett*, 55 F.3rd 1525 (11th Cir. 1995). The burden of justifying a new trial is upon the defendant. *United States v. Rachal*, 473 F.2d 1338, (5th Cir.), *cert. denied*, 412 U.S. 927 (1973).

The testimony of the three witnesses of the Sayegh family which was offered in support of the defendant's position that he had no knowledge of the fraud of which Elias Sayegh and Sonia Sayegh were convicted was considered by the court and found to be unpersuasive. These witnesses were unable to specifically remember having informed the defendant that they anticipated an attempted fraud of insurance companies in conjunction with the examination and treatment of Nancy Sayegh by the defendant. The burden being with the defendant in the instant motion, the court must conclude that this burden has not been carried.

Each of the four criteria mentioned hereinabove must be satisfied for the defendant to prevail. The court finds, however, that none of these criteria have been proved by a preponderance of the evidence.

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It is, therefore,

ORDERED and ADJUDGED that the motion of the defendant for a new trial pursuant to Federal Rule of Criminal Procedure 33 be and the same is hereby denied.

DONE and ORDERED at West Palm Beach, Florida this 3rd day of October, 1995.

s/ James C. Paine
United States District Judge